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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1248

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation, *Petitioner*,

v.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., a corporation, *Respondents*.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Florists' Telegraph Delivery Association, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit reversing the trial judge's denial of injunctive relief in a private antitrust action, the writ to issue only in the event this Court should grant

the petition for a writ of certiorari in No. 1132, at this Term, to review the same court's reversal of a jury verdict for respondent.

OPINIONS BELOW

The findings of fact and conclusions of the district court denying an injunction are not reported. They are reprinted in Appendix B of the petition in No. 1132, at 38-40. The opinion of the court of appeals is reported at 371 F.2d 263.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When jury trial is demanded by a private antitrust complaint combining claims for monetary and injunctive relief and both claims are tried simultaneously, is the trial court estopped by the jury verdict from making an independent determination of the alleged antitrust violation for purposes of the equitable claim?

STATUTE INVOLVED

The statute involved is Section 16 of the Clayton Act, 15 U.S.C. § 26, which provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust

[1] By order of Mr. Justice Clark, entered March 29, 1967, the time for filing this petition was extended to and including April 10, 1967.

laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, . . .".

STATEMENT

The Nature of the Case

This case involves a private action under Sections 1 and 2 of the Sherman Act, claiming damages and an injunction. Both claims were tried simultaneously. The facts of the case are set out in detail in the Brief in Opposition On the Petition for a Writ of Certiorari in *Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists* v. *Florists' Telegraph Delivery Association,* No. 1132 at this Term.

In brief, the issues concern the legality of two rules adopted by this petitioner—a non-profit membership corporation comprised of retail florists—prescribing anti-boycott and honest advertising standards of conduct for its members.

The Decisions Below

(a) *The Trial Court:* The damage and equity claims were tried simultaneously. Under a jury charge which this petitioner (and the court below) deemed prejudicial, for erroneous failure to instruct on the defense theory, the jury returned a verdict in respondent's favor, amounting to $450,000 trebled. Judgment was accordingly entered for respondent on February 15, 1966.

On February 25, 1966, the court entered its findings of fact and conclusions of law, sustaining petitioner's rules as reasonable under the antitrust laws,

and a judgment denying an injunction. (Pet. No. 1132, 1966 Term App. B, at 38-40).

(b) *The Court of Appeals:* The court below reversed the jury verdict on the ground that respondent had been prejudicially denied jury instructions concerning the theory of its defense. (371 F.2d at 270).

The court likewise reversed the judgment denying an injunction, on "res judicata or collateral estoppel" grounds, as follows (*id.* at 270-71):

> "FNTDN's complaint combined claims for damages and injunctive relief. In such case a trial of either claim before the other raises a collateral estoppel to the relitigation of those issues essential to the decision which are common to both claims and are decided in connection with the claim tried first. . . .
>
> "FNTDN having demanded a jury trial it was mandatory that the treble damages claim be tried and disposed of before consideration of the equitable claim for injunctive relief. The issue of the alleged violation of the Sherman Act was common to both claims. And to proceed otherwise might, through operation 'either by way of res judicata or collateral estoppel' deprive FNTDN of its right to a jury trial on its treble damages claim. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500."

The court remanded the case for a new trial on both the damage and the injunction issues, stating (*id.* at 271):

> "Thus, although our reversal and remand for a new trial voids the jury's verdict, and FTD is entitled to a new trial on the damages claim made against it, FNTDN, under the circumstances is entitled to a redetermination of its claim for injunctive relief subject, of course, to any estoppel which on retrial may flow from the jury's determ-

nation of the issues which are common to both claims."

REASONS FOR GRANTING THE WRIT. IF A WRIT IS GRANTED IN NO. 1132

The court of appeals having remanded for a new trial on both claims, the case is not final and is not ripe for review here. Moreover, as set forth in our brief in opposition in No. 1132, the petition in that case presents no question requiring this Court's attention. However, if the Court grants the petition in No. 1132, it should review the entire case and correct the lower court's errors—involving a novel and important question of federal law never decided here—in reversing the denial of the injunction and requiring prior disposition of the damage claim upon the new trial. This conditional cross-petition is filed solely for that reason.[2]

The court below decided an important question of federal law, which has not been, but should be, settled by this Court, if it grants the petition in No. 1132. This Court has never reviewed the authority and responsibility of the trial judge—under Section 16 of the Clayton Act, p. 2-3, *supra*—in adjudicating an antitrust claim for injunctive relief upon simultaneous trial with an antitrust damage claim, pursuant to a complaint combining both types of claims.

Contrary to Section 16, and in the absence of any decision of this Court so requiring, the decision below invests an antitrust plaintiff with absolute power to

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[2] A similar conditional cross-petition for a writ of certiorari was entertained by this Court in No. 196 at the 1948 Term. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755 (1949), *cert. granted sub nom. McComb* v. *Farmers Reservoir & Irrigation Co.*, 335 U.S. 809 (1948).

undermine the time-honored equity jurisdiction of the federal courts and to deprive an antitrust defendant of his statutory right to invoke that jurisdiction in contesting an antitrust claim for injunctive relief. All the antitrust plaintiff need do, in order to force trial by jury of the purely equitable claim, is incorporate his claim for injunctive relief in his complaint for damages.

Section 16 of the Clayton Act expressly provides for trial of private claims for injunctive relief

> "under the same *conditions* and principles as injunctive relief . . . is granted by courts of equity, under the rules governing such proceedings" (emphasis supplied).

Such "conditions" mean a trial by the court, not a jury. As this Court has ruled,

> "the federal courts . . . administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Insurance Company* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

"Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected." *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949).

The court of appeals improperly and needlessly emasculated Section 16 by holding that trial of a combined complaint—stating claims for money and an injunction—required prior jury hearing of the damage claim and, consequently, "under . . . the doctrine of collateral estoppel," the court's capitulation to the jury verdict in deciding the equitable claim. (371

F. 2d at 271). Assuming *arguendo* that observance of Section 16 poses a problem upon the simultaneous trial of such dual claims, it is not for the courts to ignore the statute.[3]

In truth, however, there is neither any decision of this Court, nor any practical or theoretical necessity, dictating or supporting the court of appeals' conclusion. The only authority it cited—in this phase of its decision—was *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959). But that case does not foreclose simultaneous trial of the damage claim by the jury and the injunction claim by the court. *Beacon Theatres* decided only that a prospective antitrust defendant could not use the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, as a lever to force trial by the court of antitrust claims on which the claimant was entitled to a jury trial. This case presents no such situation. Rather, it presents questions of the proper procedure in hearing a plaintiff's complaint embracing both damage and equitable claims.

There is no need whatever to eliminate trial by the court of the equitable antitrust claim in order to preserve the claimant's right to jury trial on damage issues. "Collateral estoppel"—which was the court of appeals' stumbling block—like *res judicata,* is operative only on the basis of a "former judgment." *E.g., Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955). There need be no "former judgment" in a simultaneous trial of a damage claim by the jury and an injunction claim by the court. The

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[3] "If the Act develops unanticipated complications, Congress can then meet them to such extent as it may desire to fit the demonstrated needs." *United States* v. *Yellow Cab Company,* 340 U.S. 543, 556 (1951).

traditional function of the jury and judge can each be preserved—without impairment—by simultaneous entry of the separate judgments on the verdict and on the court's determination. Neither will then precede the other. Neither will be a bar to the free adjudication of the issues by the body designated in each instance to adjudicate them.

The court of appeals, in short, became needlessly enmeshed in technical difficulties. "Such difficulties are not insurmountable." *United States* v. *Yellow Cab Co., supra,* 340 U.S. at 555 (1951). They involve simple mechanical matters which — as noted above — can be easily arranged "consistent with the plan of the Federal Rules and the [Clayton Act] to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged." *Beacon Theatres, Inc.* v. *Westover, supra,* 359 U.S. at 508-09.[4]

Should this Court grant the petition in No. 1132, a decision by this Court as to whether the district court's judgment for the defendant—petitioner here—on the equitable claim should be reinstated, is necessary to the complete adjudication of the case. Moreover, the federal courts are daily confronted with antitrust complaints stating dual claims for money damages and for injunction. The guidance of this Court would be useful to the development of a proper and uniform procedure for trying such complaints.

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[4] In this case, for example, the court of appeals' mandate could readily direct deferral of the entry of judgment on the injunction until the entry of judgment on the jury verdict at the new trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 1132, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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